REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina,on 27 October 2016
Ref. No.:RK982/16

RESOLUTION ON INAMDISSIBILITY

in

Case No. KI142/15

Applicant

Habib Makiqi

Constitutional review of
Judgment Rev.nr.231/2015 of the Supreme Court of Kosovo
of 1 September 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral is submitted by Habib Makiqi (hereinafter: the Applicant) from village of Reznik, Municipality of Vushtrri.

Challenged decisions

2. The Applicant challenges Judgment Rev.nr.231/2015 of the Supreme Court of Kosovo of 1 September 2015.

Subject matter

3. The subject matter is the constitutional review of challenged Judgment Rev.nr.231/2015 of the Supreme Court of Kosovo of 1 September 2015.

4. The Applicant alleges violation of Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 49 [Right to Work and Exercise Profession] and 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo.

5. In substance, the Applicant mainly complains with respect to the alleged inconsistency of the case-law of the Supreme Court.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Articles 47 and 48 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 1 December 2015, the Applicant submitted a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

8. On 22 January 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (presiding), Arta Rama - Hajrizi and Bekim Sejdiu (judges).

9. On 29 January 2016, the Court notified the Applicant about the registration of the Referral and a copy of the Referral was sent to the Supreme Court.

10. On 14 September 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. From the submitted documents, it follows that the Applicant was employed by the Kosovo Energy Corporation – Division of Mitrovica (hereinafter: the Employer) for an unspecified period of time.

12. On 25 August 2010, the Internal Audit of the Employer found that the Applicant has abused with the use of an electric-meter registered under his name.

13. On 18 October 2010, the District Manager of the Employer notified (Notification No. 409) the Applicant that his work contract was terminated. The work contract was terminated on the grounds that the Applicant had committed serious violations – theft of a property or ownership of KEC, including the theft of the electrical energy provided by Article 8.14, item (a) of Regulation No. 3 on the operations of the districts of KEK.

14. On 22 October 2010, the Applicant filed an objection with the Employer's Director of Division against the above-stated notification for termination of his work contract.

15. On 29 October 2010, the Employer's Director of Division (Decision No. 5473) rejected the objection of the Applicant as unfounded.

16. The Applicant filed a lawsuit with the then Municipal Court in Vushtrri claiming to be reinstated to his workplace with all the rights and work duties.

17. On 13 April 2012, the Municipal Court in Vushtrri by Judgment C. No. 460/2010 held the following:

> *"The statement of claim of Claimant Habib Makiqi is APPROVED and the Respondent – KEC in Prishtina is OBLIGED to reinstate the Claimant to his workplace and work duties – on duty electrician in the District of Mitrovica, or in a workplace and work duties which are relevant to his professional qualifications and his acquired skills in work with all the employment rights – and also a payment of the personal income starting from the date of the termination of the employment relationship on 18 October 2010, until the date of his reinstatement to his workplace".*

18. In the above-stated judgment, the Municipal Court, inter alia, reasoned that: (i) the Applicant was not notified in writing about the termination of his employment as is required by the applicable law and (ii) the Employer has not presented a final judgment of a criminal court confirming that the Applicant has been found guilty for the criminal offence of theft.

19. On 1 January 2013, the Law No. 03/L-199 on Courts entered into force which provides that jurisdiction of municipal and district courts shall be exercised by the basic courts and the court of appeal in the territory of the Republic of Kosovo.

20. From the submitted documents it transpires that the Employer filed an appeal with the Court of Appeal which remanded the case for fresh consideration before the Basic Court in Vushtrri.

21. On 23 April 2014, the Basic Court in Vushtrri by Judgment C. No. 17/14 held the following:

> *"I. The statement of claim of Claimant Habib Makiqi is APPROVED as grounded.*

II. Notification No. 409 for the termination of the employment contract, of 18 October 2010, as well as Decision No. 5473 of the Respondent – KEC, of 29 October 2010 are ANNULLED as unlawful.

III. Respondent KEC in Prishtina is OBLIGED that it reinstates Claimant Habib Makiqi in his workplace and work duties as on duty electrician in the district of Mitrovica or in another workplace suitable with his professional capacities.

IV. The Respondent is ORDERED that it compensates all the salaries to the Claimant in accordance with the employment contract and other lost benefits during the entire time of his unlawful leave, until the date of his reinstatement to the workplace".

22. In the above-stated judgment, the Basic Court, inter alia, reasoned that actions of the Employer were in contravention of the law due to non-conduct of the disciplinary proceedings foreseen by the law - and as a consequence - the Applicant was not questioned by the disciplinary body and was not allowed protection according to his choice.

23. The Employer filed an appeal with the Court of Appeal due to essential violations of the provisions of the contested procedure, erroneous and incomplete assessment of the factual situation and the erroneous application of the substantive law. The Employer proposed that the challenged Judgment be modified and the statement of claim of the Applicant is rejected as ungrounded.

24. On 4 May 2015, the Court of Appeal by Judgment CA. No. 2044/2014 rejected the appeal of the Employer as ungrounded and upheld the challenged judgment of the Basic Court. The Court of Appeal adopted the reasoning of the Basic Court by adding, inter alia, that the work contract of the employee cannot be terminated solely on the basis of the decision of the manager without the implementation of the disciplinary proceedings.

25. However, with regard to the conduct of the disciplinary proceedings, the Court of Appeal also stated:

"Following the finding of the Commission mentioned above, the Claimant has been invited in a meeting with the manager on 18 October 2010, wherein it was communicated to him that his employment contract has been terminated due to the serious violation of employment obligations. At the same day, the notice in writing was issued. In the notice for the termination of the contract, the Claimant has filed an Appeal which has been rejected".

26. The Employer filed a request for revision with the Supreme Court due to essential violations of the provisions of the Law on Contested Procedure and erroneous application of the substantive law. The Employer proposed that the judgments of the lower instance courts be modified so that the statement of claim of the Applicant is rejected as ungrounded.

27. On 1 September 2015, the Supreme Court by Judgment Rev. No. 231/2015 approved the revision of the Employer and modified the challenged judgment of the Basic and Appeal Courts respectively. The Supreme Court explained, inter alia, that the Employer has conducted and observed the disciplinary proceedings - as required by the law - and that, the Applicant was given the benefit to file his objection before the competent body of the Employer.

28. The relevant part of the above-stated judgment of the Supreme Court reads:

> *"The Supreme Court of Kosovo has found that the lower instance courts have correctly and completely ascertained the factual situation, but they have erroneously applied the substantive law, when they found that the statement of claim of the Claimant is grounded, a reason due to which the Revision of the Respondent had to be approved, judgments of the lower instances modified and the statement of claim rejected.*
>
> *The Supreme Court of Kosovo considers that Decision No. 409 of the Respondent, of 18 October 2010, for the termination of the employment contract and Decision No. 5473 of the Director of the network division, of 29 October 2010, by which objection No. 426 of 22 October 2010 has been rejected as ungrounded, are lawful, because on the basis of the administered pieces of evidence which are found in the case files it results that prior to rendering the challenged decisions, the Respondent has led the procedure in terms of the provisions of Article 11.5 (a) and (b) of the Essential Labor Law in Kosovo – UNMIK Regulation No. 2001/27, as well as Article 8.4 (a) and (b) of Regulation No. III on operations for District of KEC, on the basis of which it has been provided that in cases when Article 11.2 is applied, the employer must hold a meeting with the employer in which case he verbally explains the causes of the termination of the contract to the employee. In case the employee is a member of any syndicate, a representative of the syndicate is also entitled to be present at the meeting.*
>
> *In the present case, the Respondent has acted entirely in terms of the provisions mentioned above, wherein by the challenged Decisions, it has terminated the employment contract of the Claimant due to the serious behavior – provided by Article 11.3 (b) and (d) of UNMIK Regulation No. 2001/27, on the Essential Labor Law in Kosovo, as well as Article 8.14 (a) of the Regulation on Operations of Districts of KEC, violations for which the Respondent has imposed the disciplinary measure – termination of the employment contract".*

Applicant's allegations

29. The Applicant alleges violation of Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 49 [Right to Work and Exercise Profession] and 53 [Interpretation of Human Rights Provisions] of the Constitution.

30. The Applicant alleges that: *"In my case, two instances have decided by approving my statement of claim, whereas by the Judgment of the Supreme Court, my statement of claim has been rejected. For the same case, By*

Judgment Rev. No. 62/2014 of 20 March 2014, the Supreme Court has granted the Revision of Claimant X, and reinstated him to work. It is absurd that the Supreme Court renders different decisions for the same cases".

31. The applicant alleges that: *"During the review of the case, the Supreme Court of Kosovo has lacked impartiality, namely due to the reason that even though the Basic Court and the Court of Appeals approve the statement of claim of Claimant Habib Makiqi, the same, as if it was directed by some directive, decides the opposite and the decision, despite the pieces of evidence presented and clarified in the decisions of the first and second instance, in a (purposeful) manner is unfair, and weakens the trust of the citizens in the implementation of justice and in a lawful state".*

Assessment of admissibility

32. The Court first will examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

33. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

> *"Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

34. The Court also refers to Article 48 of the Law, which provides:

> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".*

35. The Court further takes into account Rule 36 2 (d) of the Rules of Procedure which foresee:

> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
>
> ...
>
> *(d) the Applicant does not sufficiently substantiate his claim*

36. In the concrete case, the Court notes that the Applicant mainly alleges that: *"the Supreme Court of Kosovo has lacked impartiality... the Supreme Court has granted the Revision of Claimant X, and reinstated him to work. It is absurd that the Supreme Court renders different decisions for the same cases".*

37. In this respect, the Court refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution which establishes:

"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights"

38. The Court emphasizes that Article 31 of the Constitution does not confer an acquired right to consistency of case-law. Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (See the Case of *Nejdet Şahin and Perihan Şahin v. Turkey*, [GC], application no. 13279/05, Judgment of 20 October 2011, paragraph 58).

39. In principle it is not the Court's role, even in cases which at first sight appear comparable or connected, to compare the various decisions pronounced by the domestic courts, whose independence it must respect. The possibility of divergences in case-law is an inherent consequence of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may even arise within the same court. That in itself cannot be considered contrary to the Convention (See the Case of *Santos Pinto v. Portugal*, § 41). Furthermore, there can be no "divergence" where the factual situations in issue are objectively different (See the Case of *Uçar v. Turkey*, application no. 12960/05, ECtHR, Decision of 29 September 2009).

40. Moreover on this point, the Court notes that the inconsistency of the case-law must be profound and lasting and must affect a large number of people and not be an isolated case. (See the Case of *Albu and others v. Romania,* applications nos. 34796/06 and 63 other cases, ECtHR, Judgment of 10 May 2012, paragraph 38).

41. Therefore, the Court notes that there is nothing in the Referral to suggest that the alleged inconsistency was profound and lasting or that it affected a large number of people or even if it is at all a question of an isolated case.

42. As to the violations allegedly committed during the disciplinary proceedings before the competent bodies of the Employer, the Court would like to emphasize that the fairness of proceedings is always assessed by examining them in their entirety, so that an isolated irregularity may not be sufficient to render the proceedings as a whole unfair. (See the Case of *Miroļubovs and Others v. Latvia*, § 103).

43. Article 31 of the Constitution does not guarantee favorable outcome to one's case nor does it allow the Court to question the substantive fairness of the outcome of a civil dispute, where more often than not one of the parties wins and the other loses.

44. In this respect, the Court notes that the Applicant has had the benefit of adversarial proceedings; that he was able, at the various stages of those proceedings, to adduce the arguments and evidence he considered relevant to his case; that he had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; that all his arguments which, viewed objectively, were relevant to the resolution of the case were duly heard

and examined by the courts; that the factual and legal reasons for the impugned decision were set out at length; and that, accordingly, the proceedings taken as a whole were fair (See the Case of *García Ruiz v. Spain*, [GC], application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

45. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

46. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, *García Ruiz v. Spain [GC]*, no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

47. The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of regular courts. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court" (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

48. Finally, the Court considers that the Applicant only enumerates and generally describes the content of constitutional provisions without substantiating exactly how those provisions were violated in his case as is required by Article 48 of the Law.

49. In these circumstances, the Court considers that the Applicant has not substantiated the allegations of a violation of fundamental human rights guaranteed by the Constitution. The facts of the case do not reveal that the Supreme Court acted in breach of procedural safeguards established by the Constitution.

50. Based on the foregoing considerations, the Referral, on constitutional grounds, is manifestly ill-founded and must be declared inadmissible as established by Article 113 (7) of the Constitution, provided for by Article 48 of the Law and as further specified by Rule 36 (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (2) (d) of the Rules of Procedure, on 14 September 2016, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Snezhana Botusharova Arta Rama-Hajrizi